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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. ~~683~~ 41

NORTHERN COAL & DOCK COMPANY and GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

vs.

EMMA STRAND and INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

BRIEF OF RESPONDENT, EMMA STRAND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN A CADIGAN
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Attorneys for Respondent, Emma Strand.

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not own or charter any vessels or railroad lines (R. pp. 31, 32). Both the deceased and his employer were subject to the Workmen's Compensation Act of Wisconsin if that act is applicable to the facts.

During the year 1924, deceased, up to the time of his death, although steadily employed, worked only about 117 hours on 31 boats, during which 117 hours he cleaned up coal with others in the holds of boats so that the coal could be taken out by machinery. He was carried on the payroll of the respondent coal and dock company as a car-loader-man, and by far the greater majority of his work was on land about the dock of his employer (R. pp. 31, 32, 33, 34, 35).

The grounds upon which the Supreme Court is asked to take jurisdiction are principally:

1. That at the time of his death, the deceased was a stevedore, and consequently the respondent's (Emma Strand's) cause of action must be brought under the provisions of the Jones Act (Act of Congress, June 5, 1920, 41 Stats. L. 1007).

2. That respondent's cause of action, if any, is controlled by Article III, of Section 2, of the Constitution of the United States.

3. That the Workmen's Compensation Act of Wisconsin (Chap. 102, Wisconsin Stats. 1925) is not applicable.

4. That the decision of the Supreme Court of Wisconsin in the instant case is in direct conflict with the decisions of the Supreme Court of the United States, among which decisions the following cases are specifically relied upon:

International Stevedoring Company v. Haverty, 47 Sup. Ct. Rept. 19; *Western Fuel Company v. Garcia*, 257 U. S. 233; *Southern Pacific Company v. Jensen*, 244 U. S. 205.

It is further claimed that to apply the provisions of the Wisconsin Workmen's Compensation Act to the instant case would clearly work material prejudice to the characteristic features of the general maritime law, and would interfere with the proper harmony and uniformity of that law.

The majority opinion of the Supreme Court of Wisconsin

(R. p. 55) in the instant case is based squarely upon the facts that the Act of Congress of March 30, 1920, which legislated with reference to the general subject matter of death on the high seas by wrongful act, contained the following provisions:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state. * * * (41 Stats. L. c. 111, p. 537, Sec. 1251½-f);"

and that since Strand was instantly killed, there was no liability at common law, such liability, if any, existing only on account of death by wrongful act of the employer under the provisions of Section 331.03, Wisconsin Statutes, which section is more fully set out as follows:

> "331.03 RECOVERY FOR DEATH BY WRONGFUL ACT.
>
> "Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state."

Section 331.03 of Wisconsin Statutes being abrogated as between employer and employe by the terms of section 102.03, Chap. 102, Wisconsin Statutes 1925, which follows:

> "102.02 (3) * * * And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of Section 102.03 to 102.34 inclusive, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death. .. .. "

the Supreme Court of Wisconsin further held that the Industrial Commission of Wisconsin, being by the terms of the statute, the sole tribunal in which proceedings to enforce liability under the Wisconsin Death Statute may be brought, the Wisconsin Compensation Act was applicable, and the Wisconsin Industrial Commission had jurisdiction to award compensation in this case, no question of maritime tort being involved as that matter was understood at common law.

The Harrisburg, 119 U. S. 199.
Bloom v. Furness-Withy & Co., 293 Fed. Rep. 98.
Dobrin v. Mallory S. S. Co., 298 Fed. Rep. 349.
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We submit that the Wisconsin Supreme Court is not in error, but that its decision in this case is right, and that the decision of the Supreme Court of the United States in *Western Fuel Company v. Garcia,* 257 U. S. 233 supports our contention. The opinion in the latter case does not show why the Supreme Court of California annulled an award of the Industrial Accident Commission of that state, and is authority for the proposition contended for by the Supreme Court of Wisconsin that no suit to recover damages for the wrongful death of a person may be maintained in the admiralty courts of the United States under the general maritime law. As far as we are able to ascertain from the opinion, the court held that the United States Courts might enforce the provisions of a state statute creating liability for wrongful death by an action *in personam.* The opinion is dark as to whether or not the provisions of the California Workmen's Compensation Act specifically abrogated the provisions of the California wrongful death statute as is the case in Wisconsin.

The proceedings in the instant case were commenced by respondent, Emma Strand, widow of deceased, August 10, 1925, by the filing of an application for adjustment of claim with the Industrial Commission of Wisconsin (R. p. 13). The opinion of this court in the case of *International Stevedoring Co. v. Haverty,* 47 Sup. Ct. Rept. 19, was not handed down until October 18, 1926, so respondent did not have the benefit of the interpretation of the provisions of the Jones Act (Act of June 5, 1920, C. 250, Sec. 20, 41 Stat. 988) giving "seamen" the right of action for personal

injuries under the provisions of the Federal Employers Liability Act relating to railway employes. In the *Haverty* case, this court extended the meaning of the word "seamen" to include a longshoreman, engaged in stowing freight in the hold of a boat who was injured. There was a specific finding that the employe therein involved was a longshoreman or stevedore. He was an employe of a Stevedore Company, whose business was to unload boats and thus perform a maritime service formerly rendered by the ship's crew.

We do not believe that this case has any application here as the deceased was not in any sense a stevedore or longshoreman, but was an employe of a company whose business was the mining, marketing and selling of coal at wholesale. The record shows that the unloading of boats and the casual work of the deceased on the same was but incidental to the main business of the company. We do not believe that the doctrine laid down in the *Haverty* case can be extended to the one at bar so as to make a stevedore out of the deceased for the purpose of depriving the courts of Wisconsin of jurisdiction in the case.

The petitioners have failed to point out in what manner the application of the local compensation act to the facts involved in the instant case will interfere with the desirable rule of uniformity of the characteristic features of the general maritime law. No claim has been asserted in the instant case that would in any way interfere with such uniformity. The claim here is made against a company whose business is mining, handling and selling of coal; a company which owns, operates or charters no vessels, or railways, and a company that is not engaged in the stevedore business. If the boat in which deceased was killed was owned by the petitioner, Northern Coal & Dock Company, the situation would be entirely different, and we would be confronted with that raised in the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205, where the deceased was killed on a steamship owned by his employer, the Southern Pacific Company. The work being done in that case by deceased was clearly the work of a stevedore engaged in fulfilling a maritime contract, and the injuries from which he died were likewise maritime. The application of the provisions of the Workmen's Compensation Act of New York to the facts in the *Jensen* case would destroy the uniformity in

respect to maritime matters which the Constitution was designed to establish.

We do not agree, as contended by petitioners, that admiralty jurisdiction in tort matters depends upon locality, and point to the decision of this court in *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59. The locality of the tort in that case (a diver who was drowned while cutting off piles in a navigable river), was certainly maritime, but this court held that the Workmen's Compensation Law of Texas applied, on the ground that the matter was of mere local concern, and its regulation by the state would work no material prejudice to the characteristic features of the maritime law.

In view of the latter decision, we believe the reasoning therein fits the facts in the instant case like a glove.

WHEREFORE, by reason of the foregoing, the respondent, Emma Strand, submits that the decision of the Supreme Court of Wisconsin in the instant case is right, and that the Industrial Commission of Wisconsin had jurisdiction to make the award complained of, and that the petition for Writ of Certiorari filed herein by petitioners must be denied.

Respectfully submitted,

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